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No. 96 919

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF ARKANSAS,

Petitioner,

V.

EUGENIA T. DONOVAN,
ARKANSAS TERM LIMITS,
FRANK GILBERT, AND SPENCER G. PLUMLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Article V of the United States Constitution prohibit the people of the several states from participating in the amendatory process by popular initiatives designed to inform their legislators and congressional delegations of their views?

PARTIES TO THE PROCEEDINGS

Petitioner State of Arkansas was an intervenor in the court below. Respondent Eugenia T. Donovan was the plaintiff in the original action in the court below. Respondents Arkansas Term Limits, Frank Gilbert, and Spencer G. Plumley were intervenors in the court below. Sharon Priest, the Secretary of State of Arkansas, was the defendant below, but she is not a respondent in this Court because the State has reason to believe that she has no interest in the outcome of the petition.

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The State of Arkansas respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 326 Ark. 353, 931 S.W.2d 119. Appendix at A-1-A-18.

JURISDICTION

The Arkansas Supreme Court entered its judgment in this case on October 21, 1996. Appendix at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Article V of the United States Constitution provides as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

STATEMENT OF THE CASE

On September 4, 1996, Sharon Priest, the Secretary of State of the State of Arkansas, certified for the November 5, 1996, general election a ballot initiative for proposed Amendment 9 to the Arkansas Constitution. The popular name of proposed Amendment 9 was the "The Congressional Term Limits Amendment of 1996" and was proposed through the ballot-initiative process provided by Amendment 7 to the Arkansas Constitution. Among other provisions, proposed Amendment 9 states that the will of the people of Arkansas is for an amendment to be added to the United States Constitution limiting the terms of members of the United States House of Representatives and Senate, instructs Arkansas' congressional delegation and state legislators to use all of their official powers to ensure adoption of such an amendment, and provides that those elected officials who do not follow that instruction will have "DISREGARDED VOTER INSTRUCTIONS ON TERM LIMITS[,]" printed next to their names on various election ballots. Appendix at A-23.

After the Secretary of State certified the ballot initiative for proposed Amendment 9 and ballots for the general election had been printed, respondent Eugenia Donovan filed an original-action complaint against the Secretary of State in the Arkansas Supreme Court on September 20, 1996. In her complaint, respondent Donovan alleged that proposed Amendment 9 is not the proper subject of a ballot initiative by the people under Amendment 7 to the Arkansas Constitution because it seeks to give the people power to propose amendments to the United States Constitution, a power they do not have under Article V of that Constitution. In her prayer for relief, respondent Donovan sought to have proposed Amendment 9 struck from the ballot, or, in the alternative, to enjoin the Secretary of State from counting ballots cast for proposed Amendment 9. Proponents of proposed Amendment 9, respondents Arkansas Term Limits, Frank Gilbert, and Spencer Plumley intervened in the action to defend the constitutionality of proposed Amendment 9.

In an opinion delivered on October 21, 1996, the Arkansas Supreme Court agreed with respondent Donovan's arguments. The Court held that proposed Amendment 9 violates Article V of the

United States Constitution and this Court's holdings in *Hawke v. Smith*, 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130 (1922), because it indirectly attempts to have the people of Arkansas, instead of its congressional delegation or state legislature, propose an amendment to the United States Constitution. Appendix at A-17. In view of its holding that proposed Amendment 9 is an unconstitutional attempt by the people to amend the United States Constitution, the Court also held that the people did not even have the power to propose Amendment 9 as a ballot initiative. Appendix at A-17. Consequently, the Court enjoined the Secretary of State from either placing proposed Amendment 9 on the ballot or, alternatively, from declaring the results of any votes cast with respect to it. Appendix at A-18.[1]

After the Court issued its opinion, it granted the State's motion to intervene on October 29, 1996. On November 2, 1996, this Court granted the State's and respondents Arkansas Term Limits', Frank Gilbert's, and Spencer Plumley's applications for a stay of the Arkansas Supreme Court's decision and mandate, pending the timely filing of a petition for a writ of certiorari and disposition of that petition. Consistently with that stay, on December 2, 1996, the Arkansas Secretary of State certified the ballots cast in the general election concerning Amendment 9, resulting in the adoption of Amendment 9 by an overwhelming margin, with 445,381 votes cast in favor of Amendment 9 and 288,094 votes cast in opposition to Amendment 9.

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[1]In one passage of its opinion, the Arkansas Supreme Court stated that it was not reviewing proposed Amendment 9's validity, but rather, whether its proponents were entitled to invoke Arkansas' initiative process in the first instance. Appendix at A-6. This and similar statements in the Court's opinion do not provide an adequate and independent state-law ground for the Court's decision insulating its decision from this Court's review. Throughout its opinion, the Arkansas Supreme Court relies on its interpretation of Article V of the United States Constitution for its state-law holding. The Court stated, for example, that "[o]ur discussion of this issue necessitates our review of the powers authorized by Article V of the United States Constitution and the case law that has interpreted those powers[,]" Appendix at A-6, and that "Article V prohibits the action proposed by the measure at hand." Appendix at A-17. Indeed, the bulk of the Court's opinion is spent discussing cases interpreting Article V. Appendix at A-12-A-17. Consequently, the Arkansas Supreme Court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law[.]" *Ohio v. Robinette*, 65 U.S.L.W. 4013, 4014 (1996)(quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

REASONS FOR GRANTING THE WRIT

The question the petition presents is whether the people of the several states are barred by Article V from expressing their views through the initiative process in favor of particular constitutional amendments. The answer to this question is of vital importance to determining the role of the people in the constitutional scheme. The Arkansas Supreme Court's decision answering this question not only conflicts with the decisions of other state courts, but also conflicts with this Court's jurisprudence interpreting Article V. Because the Arkansas court's judgment wrongly limits the role of the people in our federal scheme, this Court should grant the petition for a writ of certiorari and review that judgment.

I. The Arkansas Supreme Court's Decision Exacerbates The Conflict Of Authority Among State Courts On The Scope Of Article V's Limits On The Popular-Initiative Process By The People Of The Several States.

The Arkansas Supreme Court concluded that proposed Amendment 9 to the Arkansas Constitution is "clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures — not from the people." *Donovan v. Priest*, 326 Ark. 353, 371, 931 S.W.2d 119, 128 (1996). State courts are in marked disagreement over whether Article V restricts a state's popular-initiative process as the Arkansas Court concluded it does. The Court should resolve that conflict to ensure unvaried application of Article V throughout the states.

As the court below noted, several courts have interpreted Article V's place in our federal scheme to mean that its amendatory requirements limit voters' popular-initiative power by prohibiting initiatives that effectively only call for a particular amendment to the United States Constitution. In *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829-30 (Mont. 1984), the Supreme Court of Montana concluded that a proposed initiative that called for the state legislature to make application to Congress for a constitutional convention to propose a balanced-budget amendment (under penalty of interminable

session without pay) ran afoul of Article V's intent that only deliberative legislatures could call for conventions. Similarly, California's highest court rejected that part of an initiative that sought the same effort from the California legislature (under penalty of loss of salary) because Article V could not countenance "puppet legislators coerced or compelled . . . to vote in favor of a proposal . . . ." *AFL-CIO v. Eu*, 686 P.2d 609, 613 (Cal. 1984) (as modified after application for stay denied). The Supreme Courts of Maine and Massachusetts have also offered their opinions that Article V's reference to legislatures excludes initiative measures from the Amendment process. *See Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (popular initiative to ensure application by legislature for term-limits amendment would violate Article V); *see also Opinion of the Justices to the Senate*, 366 N.E.2d 1226, 1227-28 (Mass. 1977) (meaning of legislature in applications clause of Article V does not include all of legislative processes).

Other courts, however, have not understood Article V to leave the people and the popular-initiative process out of the federal scheme altogether, or even entirely out of the federal amendatory process. In *Kimble v. Swackhamer*, 584 P.2d 161, 162-63 (Nev. 1978), *application for stay denied*, 439 U.S. 1385 (1978), *and appeal dismissed*, 439 U.S. 1041 (1978), the Supreme Court of Nevada upheld (in the face of an Article V challenge) a state law calling for an advisory vote on ratification of the Equal Rights Amendment by the state legislature. The advisory vote was only that, advisory, and did not divest the Nevada legislature of its Article V ratification responsibility. Similarly, the California Supreme Court, although it struck that part of an initiative requiring the state legislature to call for a convention on pain of loss of compensation in *Eu*, 686 P.2d at 613, 622, nevertheless noted that Article V was not transgressed by the part of the initiative that "merely adopt[ed] a resolution urging Congress to submit a constitutional amendment to the states, and mandate[ed] the Legislature to adopt that resolution[.]" *Id.* at 622. Perhaps going the farthest, the Alabama Supreme Court, in a prohibition-era case, concluded that Article V was not violated even by a binding instruction to delegates considering the Twenty-First Amendment at a state constitutional convention. *In re Opinion of the Justices*, 148 So. 107, 110-11 (Ala. 1933).

Thus, as voters around the United States seek congressional

term limits through constitutional amendment, as required by this Court's holding in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995) — or as they seek any other political reform — opposite views of Article V's limits on the popular-initiative process simultaneously obtain in several states. As a result, Article V "split[s] the atom of sovereignty[,]" *id.* at 1872 (Kennedy, J., concurring), differently from one state to the next. The comparative valences of a voter's state and federal roles (whatever they might be) in the federal amendatory process, however, should be uniform throughout the nation under Article V's application clause. Only this Court can definitively discern the constitutional weight of those roles and uniformly declare their respective affinity to the initiative and amendatory processes.

II. The Question Whether Article V Prohibits The People Of The Several States From Expressing Their Preference For Term Limits Or Other Constitutional Change Or Offering Direction To Their Elected Representatives To Secure Such Changes Is An Important Question Which The Court Should Answer.

Limiting the terms of members of Congress is an issue of fundamental political importance and of continuing concern to the citizens of the State of Arkansas and millions of other Americans. Two terms ago in *Thornton*, 115 S. Ct. at 1871, this Court held that states cannot limit the terms of their own congressional delegations, noting that "[a]ny change [adopting term limits on congressional service] must come . . . through the Amendment procedures set forth in Article V." By proposing Amendment 9, the voters of the State of Arkansas sought to make known to their elected representatives their wish to have the Constitution amended to reflect their preference for term limits.

Amendment 9 states that "the people of the State of Arkansas desire to amend the United States Constitution to establish term limits . . . ." Appendix at A-22. In parallel provisions, the amendment calls on both federal and state officeholders, consistently with the respective duties of each office, to secure a federal term-limits amendment. Appendix at A-23, A-26. The amendment also provides by parallel provisions that the only consequence of failure to abide its terms is that

the ballot at subsequent elections "shall inform the voters regarding any incumbent and non-incumbent [candidate's] failure to support the Congressional Term Limits Amendment." Appendix at A-23. Thus, proponents of Amendment 9 simply seek the opportunity to be represented by elected officials willing to support term limits. As this Court reiterated in *Thornton*, it is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *Id.*, 115 U.S. at 1845 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

The method by which Arkansas voters have sought, through Amendment 9, to choose whom they please, is not unlike the methods used by voters at the beginning of this century who sought to choose those representatives who supported the popular election of Senators. *See* Rotunda, "The Aftermath of *Thornton*," 13 Const. Commentary 201, 206-09 (1996)(discussing adoption of 17th Amendment); *see also* Kobach, "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," 103 Yale L.J. 1971, 1976-80 (1994). As the history of both the adoption of the Seventeenth Amendment and the current efforts to adopt a term-limits amendment make clear, the people of the several states intend to resort to the initiative process to inform their representatives of their desire to amend the United States Constitution. In light of these efforts, it is incumbent upon this Court to decide whether this avenue is available to the people consistently with Article V. In short, this case is important not only because the people of Arkansas seek to choose those who would choose term limits, but also because the Arkansas Supreme Court has erroneously concluded that the people are to be excluded from the process by which they might endeavor to make their choice. That error warrants correction by this Court.

III The Arkansas Supreme Court Erred By Holding That Article V Prohibits The People From Participating In The Amendment Process By Popular Initiative.

The Arkansas Supreme Court erroneously interpreted Article V as prohibiting the people of the several states from expressing any kind of opinion concerning how and whether the United States Constitution is to be amended. That is not and cannot be the law.

Certainly, the Article V jurisprudence of this Court upon which the Arkansas Supreme Court relied does not dictate such a holding. In *Hawke*, the Court held that the people do not have power under Article V to ratify a proposed amendment to the United States Constitution because the methods provided in that Article are exclusive. *Hawke*, 253 U.S. at 227. Similarly, in *Leser*, the Court merely reaffirmed that the method for amending the Constitution is derived from the Constitution. *Id.*, 258 U.S. at 137. Neither of these cases holds that the people cannot express their opinion that they want to have a particular amendment proposed or ratified, however, as the Arkansas Supreme Court held in this case.

In *Kimble v. Swackhamer*, 439 U.S. 1385 (1978)(Rehnquist, J., in chambers), then-Associate Justice Rehnquist agreed with this understanding of *Leser* and *Hawke* when denying an application to enjoin the counting of nonbinding referendum ballots to determine whether the people of Nevada supported ratification of the Equal Rights Amendment. Justice Rehnquist stated that the objection to "citizen participation in the amendatory process[ ]" did not present a substantial question in view of the referendum's "nonbinding character[.]" *Kimble*, 439 U.S. at 1387. He went on to distinguish *Leser* and *Hawke* on the ground that ratification of the Equal Rights Amendment would still be dependent upon the vote of the Nevada legislature, regardless of the vote on the referendum. *Kimble*, 439 U.S. at 1387. He concluded by stating that Article V was not an obstacle to "communication between the members of the legislature and their constituents." *Kimble*, 439 U.S. at 1387-88.

The State recognizes that *Kimble* is not binding authority, but the Arkansas Supreme Court's attempt to distinguish it exposes the fallacy of that Court's reasoning. Amendment 9 admittedly instructs members of Arkansas' legislature and its congressional delegation to do everything in their power to ensure the adoption of a term-limits amendment to the United States Constitution. Under Amendment 9's provisions, however, the only penalty exacted upon those elected officials who do not advocate amending the Constitution is that the electorate will be informed of that fact and, consequently, might vote them out of office — a possibility which the Arkansas Supreme Court admitted exists even without Amendment 9. Appendix at A-17. In other words, under Amendment 9, Arkansas' congressional delegation and its legislators remain free to vote against term limits as they see

fit. The Arkansas Supreme Court was simply wrong to equate citizens voting for candidates with legislators voting for a constitutional amendment or applying for a convention.

A ballot initiative that seeks to inform voters that candidates for their state legislature and Congress have not supported term limits does not violate Article V because it infringes on the deliberative process of applying for a constitutional convention or proposing amendments. In *Ray v. Blair*, 343 U.S. 214, 225-30 (1952), the Court held that requiring electoral college candidates to pledge to vote for particular presidential candidates did not violate the 12th Amendment by virtue of the fact that such pledges impinged upon the electors' independent judgment. In a similar manner, Article V does not guarantee that state legislators and members of Congress will be free from the consequences of their own actions while in office — i.e., give them insurance against "potential political death" — yet that is what the Arkansas Supreme Court held. Appendix at A-17. Even that Court recognized that voters have the right to vote against candidates who do not actively support term limits. The Constitution does not guarantee that participants in the deliberative process will remain insulated from the people they represent.

Apparently, the Arkansas Supreme Court's only objection to Amendment 9 was that it enhances voters' participation by requiring that candidates' views on term limits be printed on the ballot. An informed electorate does not, however, strip legislators of their Article V power. Moreover, the availiability of such information on the ballot — such as a candidate's political affiliation or whether the candidate supports particular measures — has a long tradition in this country, including in Arkansas, and has previously led to the Constitution being amended. *See* Rotunda, *supra*, at 206-09 (discussing adoption of 17th Amendment); Ark. Code Ann. § 7-5-208(f)(5) (Supp. 1995)(requiring candidates' political affiliation to be printed on ballots). The Arkansas Supreme Court's judgment that Article V requires both a nonparticipatory and an uninformed electorate is a judgment that should be corrected by this Court.

CONCLUSION

For the reasons and authorities set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 96-1120

Opinion Delivered OCT 21 1996

EUGENIA T. DONOVAN, Individually,
and On Behalf of All Others Similarly Situated,
PETITIONER,
ORIGINAL ACTION

V.

SHARON PRIEST, Secretary of State
of the State of Arkansas,
RESPONDENT,

ARKANSAS TERM LIMITS, FRANK
GILBERT, and SPENCER G. PLUMLEY
INTERVENORS,
PETITION GRANTED.

DONALD L. CORBIN, Associate Justice

Petitioner, Eugenia T. Donovan, citizen and taxpayer, asks this court to enjoin Respondent, Secretary of State Sharon Priest, from placing the proposed Amendment 9 to the Arkansas Constitution on the ballot for the general election on November 5, 1996. Petitioner also requests that any votes that may have already been cast for the proposed Amendment 9 not be counted. We allowed the intervention of three additional parties in this original action, which was filed pursuant to Amendment 7 to the Arkansas Constitution of 1874: "Arkansas Term Limits," the unincorporated sponsor of the proposed Amendment 9; Frank Gilbert, Executive Director of "Arkansas Term Limits;" and Spencer G. Plumley, Chairman of "Arkansas Term Limits."

Petitioner asserts that the proposed Amendment 9 exceeds the legislative powers reserved to the people of this state by our Amendment 7 in that it directly contravenes the amendment process provided for

in Article V of the United States Constitution. Respondent and Intervenors contend that the proposed Amendment 9 does not exceed the powers of the people reserved in Amendment 7 and that, even if it did, Petitioner's challenge to the proposal is a question of substantive constitutional law that is not yet ripe for our review. Our jurisdiction to hear this case is original and exclusive pursuant to Amendment 7 of the Arkansas Constitution.

I. Justiciability

Respondent and Intervenors urge us to decline review of Petitioner's constitutional challenge to the proposed Amendment 9 because the issue is not ripe for adjudication and, as such, any opinion issued by this court on the matter would be purely advisory. Petitioner asserts that our review of the sufficiency of the petition for this proposed amendment, as provided in Amendment 7, necessarily encompasses the issue of whether the proposal is within the powers reserved to the people in Amendment 7. Petitioner argues that the people of this state do not have the right to propose such a measure as the proposed Amendment 9, which instructs the legislators of this state, along with the Arkansas delegation to Congress, to use all the powers of their respective offices in proposing and securing an amendment to the United States Constitution limiting the number of terms members of Congress may serve. Petitioner asserts that the procedures for proposing amendments to the United States Constitution are specifically and exclusively provided for in Article V of that Constitution. Respondent and Intervenors counter that Petitioner's argument is nothing more than a substantive constitutional challenge to the proposal, and as such, our review of the issue is not proper unless and until the measure has become law.

Our reading of the proposed Amendment 9 indicates that it is procedural in nature, purporting to empower the electorate with an indirect and prohibited means to propose an amendment to the United States Constitution. Hence, we agree that the threshold issue presented requires an analysis of whether such a procedure is encompassed within the powers reserved to the people of this state in Amendment 7.

Amendment 7 to the Arkansas Constitution of 1874 provides in part:

> The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, *but*

> *the people reserve to themselves the power to propose legislative measures, laws and amendments* to the Constitution, and to enact or reject the same at the polls independent of the General Assembly[.] [Emphasis added.]

Amendment 7 further provides that the sufficiency of statewide petitions for initiatives shall be decided in the first instance by the Secretary of State, subject to the review of the supreme court which has original and exclusive jurisdiction over such causes. Upon legal challenges to initiative matters, Amendment 7 places the burden of proof "upon the person or persons attacking the validity of the petition." As to the scope of Amendment 7 and its incorporation of the reserved rights of the people, this court has previously observed that "[t]he voters of this state essentially have, *within constitutional limits,* a right to change any law or any provision of our Constitution they deem appropriate through Amendment 7 to the Constitution." *Dust v. Riviere,* 277 Ark. 1, 4, 638 S.W.2d 663, 665 (1982)(emphasis added). Clearly those constitutional limitations derive from both the United States Constitution and this state's constitution. On the federal level, the rights reserved to the states and to the people of the states originate from the Tenth Amendment to the United States Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, our Amendment 7 cannot empower the people of this state to initiate any measure, law, or amendment which falls outside the powers reserved to the states and their citizens by the United States Constitution. We understand this to be the essence of Petitioner's challenge.

This court has previously decided cases in which it reviewed the validity of the people's reserved powers of initiative and referendum. In *Czech v. Baer,* 283 Ark. 457, 677 S.W.2d 833 (1984), this court was presented with a challenge to the validity of a proposed local initiative. In determining that such a review of the initiative could be conducted by this court prior to the election, the majority opinion states:

> At the outset the appellees argue that we should permit the measures to be placed on the ballot without first determining their validity. Certainly it is true that a party who resists an initiated petition on grounds such

> as insufficiency of signatures or improper ballot title is not required to question the validity of the proposed measure. On the other hand, that *question may be considered and decided* when it is properly raised, even before the election. *Proctor v. Hammans*, 277 Ark. 247, 640 S.W.2d 800 (1982); *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656 (1912).

Id. at 459, 677 S.W.2d at 835 (emphasis added).

In *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656 (1912), this court considered our state's previous Initiative and Referendum Amendment, which is comparable to our present-day Amendment 7, together with its enabling clause and determined that it was the duty of this court to determine the validity of a proposed amendment before such became law. The court concluded that it must determine whether the proposed measure is *"subject to the initiative power of the people,* and that the petition is legally sufficient[.]" Id. at 591, 149 S.W. at 659 (emphasis added).

More recently in *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992), this court declined to address the petitioners' substantive constitutional challenge as to whether a proposed measure conflicted with the Qualifications Clause of the United States Constitution. The majority opinion did, however, acknowledge that this court had previously addressed constitutional challenges to a proposal's validity, but limited such review to situations where the proposed measure was "clearly contrary to law" and, therefore, should not be submitted to the electorate. *Id.* at 660, 841 S.W.2d at 142. In addition to the consideration of whether a proposed measure is "clearly contrary to law," this court has indicated that in determining whether an issue is justiciable, factors to be weighed include whether the issue at hand is a matter of significant public interest and a matter of constitutional law. *See U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994); *Bryant v. English*, 311 Ark. 187, 843 S.W.2d 308 (1992).

It has been said that the pertinent issue in cases such as this one "is not the hypothetical question whether the law, if passed, would be constitutionally defective; rather, it is the present and ripe question whether the measure's proponents are entitled to invoke the direct legislation process at all." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64

Notre Dame L. Rev. 298, 314 (1989) (emphasis added). We agree, especially when considering our decisions in *Czech*, *Hodges*, and *Plugge*. We also agree that a case such as this one is ripe for the following reasons: (1) The case is concrete and the record will not be improved by waiting until after the election is held; (2) the factual controversy — whether procedural and subject-matter requirements have been met — exists before the election; (3) post-election events will not sharpen the issues, as no additional facts are necessary for decision; and (4) the issue is not speculative nor hypothetical because the only constitutional issues involved are those that govern the proponents' right to invoke the direct-legislation process. *Id.*

Regarding justiciability in general, this court has previously stated that declaratory relief will lie where (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *U.S. Term Limits, Inc.*, 316 Ark. 251, 872 S.W.2d 349. Here, there is clearly a case in controversy over the effect and application of the proposed Amendment 9 between parties with adverse interests. Certainly Petitioner as a citizen, resident, taxpayer, and registered voter has a legal interest in the controversy. As to the issue of ripeness, the federal courts have viewed it as largely a matter of timing. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994). In *Thorsted*, the district court pointed out that the United States Supreme Court has recognized the importance in deciding challenges to the constitutionality of election laws when it held that "[j]usticiability in such cases depends not so much on the fact of the past injury but on the prospect of its occurrence in an impending or future election." *Id.* at 1075 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300, n. 12 (1979)).

Other courts have conducted preelection reviews of a proposed measure's validity. In *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920), the United States Supreme Court considered the issue of whether a proposed measure was constitutional under Article V of the United States Constitution before it had been enacted into law. The Supreme Court of California has interpreted *Hawke* as direct authority for the proposition that a state court can remove a proposed amendment from a state election ballot on the ground that it does not conform to Article V, and by implication, that a state court has authority to adjudicate that preelection question. *See, e.g., AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984).

Based on the aforementioned decisions of this court as well as other courts, we hold that our review of the sufficiency of a proposed measure, as provided for in Amendment 7, includes a review of whether the measure's proponents are entitled to invoke the direct initiative process when such issue is properly presented. In so holding, we do not conclude that we will entertain substantive constitutional challenges to a proposed measure, such as whether it violates the free speech provision of the First Amendment, before an election has been held. We distinguish such substantive constitutional challenges from procedural challenges in that the former necessarily involve fact-specific issues and thus are not ripe for review until the proposed measure becomes law and a case in controversy arises. Given that the review we are asked to conduct in this case is not one of direct review of the proposed amendment's validity, but rather one of whether the proposed amendment's advocates are entitled to invoke our initiative process in the first place, we will address the merits of Petitioner's challenge. Our discussion of this issue necessitates our review of the powers authorized by Article V of the United States Constitution and the case law that has interpreted those powers.

II. Constitutional Challenge

Article V of the United States Constitution provides in pertinent part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]

The pertinent sections of the proposed Amendment 9 provide as follows:

> (e) It is the will of the people of the State of Arkansas that the following amendment be added to the United States Constitution:

Congressional Term Limits Amendment

Section a. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section b. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

Section c. This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

. . . .

(g) Each member of the Arkansas delegation to the United States Congress is hereby *instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits* Amendment set forth in subsection (e) above.

(h) All primary, general, and special election ballots *shall* have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Representative or United States Senator who:

(1) Failed to vote in favor of the Congressional Term Limits Amendment proposed in subsection (e) when brought to any vote;

(2) Failed to second the Congressional Term Limits Amendment proposed in subsection (e)

if it lacked for a second before any proceeding of the legislative body;

(3) Failed to propose or otherwise bring to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above; or

(4) Failed to vote in favor of discharging the Congressional Term Limits Amendment proposed in subsection (e) before any committee or subcommittee upon which the legislator served in the respective legislative body; or

(5) Failed to vote against or reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the Congressional Term Limits Amendment set forth in subsection (e); or

(6) Failed to vote against any term limits proposal with terms longer than those set forth in the Congressional Term Limits Amendment proposed in subsection (e); or

(7) Sponsored or co-sponsored any proposed constitutional amendment or law that proposes term limits longer than those in the Congressional Term Limits Amendment set forth in subsection (e); or

(8) Failed to ensure that all legislative votes on congressional term limits were recorded and made available to the public.

. . . .

(k) The House of Representatives of the State of Arkansas, and the Arkansas Senate, due to the desire of the people of the State of Arkansas to establish term limits for the Congress of the United States, are *hereby instructed to make the following application to the United States Congress*, pursuant to their powers under Article V of the United States Constitution, to wit:

"We, the people and legislature of the State of Arkansas, due to our desire to establish term limits on the members of the Congress of the United States, hereby make application to the United States Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposed amendments to the Constitution."

. . . .

(l) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state senator or state representative who:

(a) Failed to vote in favor of the application set forth in subsection (k) above when brought to a vote; or

(b) Failed to second the application set forth in subsection (k) above if it lacked a second; or

(c) Failed to vote in favor of all votes bringing the application set forth in subsection (k) above before any committee or subcommittee upon which the legislator served; or

(d) Failed to propose or otherwise bring to a vote of the full legislative body the application set forth in subsection (k) if it otherwise lacked a

legislator who so proposed or brought to a vote of the full legislative body the application set forth above; or

(e) Failed to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application set forth in subsection (k) above; or

(f) Failed to ensure that all votes on the application set forth in subsection (k) were recorded and made available to the public; or

(g) Failed to vote against any change, addition, or modification to the application set forth in subsection (k) above; or

(h) Failed to attend a hearing, session, or vote of the legislative body concerning any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure to attend resulted in any failure to obtain a quorum sufficient to conduct business; or

(i) Failed to move for, second, or vote in favor of a roll-call vote on any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure resulted in the defeat of any aspect of subsection (e) and subsection (k) above, without recording the votes of individual legislators to be held accountable at a later time.

(j) Failed to vote against any effort to rescind the application.

(k) Failed to vote in favor of the amendment set forth in subsection (e) above, when the amendment was sent to the states for ratification; or

(l) Failed to vote against any term

limits amendment with terms longer than the limits set forth in the proposed amendment in subsection (e) above, when such an amendment is sent to the states for ratification.

. . . .

(n) (1) The Secretary of State of the State of Arkansas shall be responsible for making an accurate determination as to whether a candidate for state or federal legislative office shall have placed next to the candidate's name on the election ballot the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" and for certifying the appropriate indication to the appropriate county clerks and other appropriate voting officials. [Emphasis added.]

It is clear from the aforementioned provisions that the proposed Amendment 9, which bears the popular name "THE CONGRESSIONAL TERM LIMITS AMENDMENT OF 1996," directs both state and federal legislators to use the power of their respective offices to advance the cause of adopting a proposed amendment to the United States Constitution that would limit the number of terms of United States Representatives and Senators. The proposed Amendment 9 also directs the General Assembly to use the power specifically granted to the state legislatures in Article V to ask the United States Congress to call a constitutional convention. The proposed Amendment 9 essentially provides for a vote of the people to initiate the application process for a constitutional convention and, likewise, it provides for a vote of the people to propose to Congress an amendment to the United States Constitution. In the event any individual legislator, state or federal, fails to do as instructed, the proposed Amendment 9 states that the words "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" shall be placed adjacent to their names on any ballots in future elections.

Respondent and Intervenors assert that the proposed Amendment 9 does not contravene Article V because it neither

prevents nor compels any action by any legislator, state or federal; it merely puts the legislators on notice of the desire of the people to have term limits on members of Congress. Further, Respondents and Intervenors assert that the main focus of this proposed amendment is its provision for additional ministerial duties of the Secretary of State, and that there is no binding effect on any legislative power nor any penalty assessed to legislators. As discussed earlier, we limit our review to the only justiciable issue — whether Amendment 7 reserves to the people of the State of Arkansas the power to propose amendments to the United States Constitution and to make application to Congress for a constitutional convention. In order to resolve this issue, it is helpful to review the case law interpreting the provisions of Article V.

In *Hawke*, 253 U.S. 221, the Supreme Court determined that a provision of the Ohio constitution extending the referendum to the ratification process of proposed amendments to the United States Constitution was in conflict with Article V. The Court stated that Article V provides for the proposal of constitutional amendments only by votes of two-thirds of both houses of Congress or upon application of the legislatures of two-thirds of the states, "thus securing deliberation and consideration before any change can be proposed." *Id.* at 226. The Court further states that "[t]he language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution as fixed." *Id.* at 227. The Court defined the term "legislatures" as the representative body which makes the laws of the people — *not* the people themselves. *Id.* In concluding that the power to ratify a proposed amendment to the United States Constitution is derived from that Constitution, the Court wrote:

> It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The *act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.*

Id. at 230 (emphasis added). Ultimately, the Court held that Article V only authorized state legislatures (i.e. the law-making bodies

themselves) to ratify amendments to the United States Constitution. The Court thus concluded that the people, through the process of initiative and referendum, did not have the same power.

Two years after the decision in *Hawke*, the Supreme Court had another occasion to address the ability, or lack thereof, of the people of the states to ratify a proposed amendment to the United States Constitution. In *Leser v. Garnett*, 258 U.S. 130 (1922), the Court held that any measure which purports to place the power to ratify proposed amendments to the United States Constitution in the hands of the people of the states, and which takes such power away from the state legislatures is unconstitutional because it conflicts with Article V. The Court held:

> [T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a *federal function* derived from the Federal Constitution; and it *transcends any limitations sought to be imposed by the people of a State.*

Id. at 137 (citations omitted) (emphasis added).

Respondent and Intervenors argue that neither *Hawke* nor *Leser* is applicable to the situation presented in this case because both cases pertain only to the ratification clause of Article V. Instead, they assert that *Kimble v. Swackhamer*, 439 U.S. 1385 (Rehnquist, Circuit Justice 1978) is controlling. Their reliance on *Kimble* is misplaced, however, as the factual scenario presented in *Kimble* is opposite to that in the instant case. In *Kimble*, the Nevada state legislature had requested an advisory referendum from the people as to their positions on the proposed Equal Rights Amendment to the United States Constitution, ostensibly for the purpose of polling their constituents. Justice Rehnquist, acting in his capacity as Circuit Justice, concluded that the citizen participation in the amendatory process in that particular instance was not unconstitutional because of the *nonbinding* character of the referendum. While acknowledging the soundness of the previous holdings in *Hawke* and *Leser*, Justice Rehnquist concluded that neither of those cases ruled out "communication" between legislators and their constituents. *Id.* at 1387-88. That is not the case with proposed Amendment 9, which we conclude goes beyond a mere advisory referendum or a nonbinding communication between legislators and citizens.

In *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (1984), the Supreme Court of Montana considered the issue of whether the people of that state could dictate to the state legislature that an application be made to Congress to call a constitutional convention. Specifically, the proposed ballot measure, not unlike the one at hand, directed the Montana Legislature to submit application to Congress for a constitutional convention in order to propose a balanced-budget amendment to the United States Constitution. The measure further provided that if the state legislature failed to make such application within ninety days, it had to remain in session, with only three days of permissible recess and without pay to the legislators until such application was made.

Relying on the holdings of *Hawke* and *Leser*, the Montana court held that the word "legislatures," as used in both the ratification clause and the proposal clause of Article V, referred to the legislative bodies of the states. The court reasoned that the framers of the United States Constitution would not have ascribed different meanings to the two instances in Article V where the word "legislatures" is found. The court further echoed the framers' sentiments that the amendatory process should be deliberate, holding that "whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage acting in the absence of any external restrictions or limitations." *State ex rel. Harper*, 691 P.2d at 830.

The sponsors of the Montana measure argued, just as Respondent and Intervenors do in this case, that the initiative was merely a nonbinding recommendation to the legislature. In rejecting that argument, the Montana court pointed to the express language directing the actions of the legislature as well as the consequences for not following those directions, namely that the legislature would be kept in "perpetual session" and, after a period of ninety days, legislators would no longer receive compensation. *Id.* The court determined that such restrictions violated the spirit of Article V as interpreted in *Hawke* and *Leser*. Finally, the court concluded that "[l]egislative deliberation cannot exist where the outcome is a predetermined specific action. . . . The people through initiative cannot affect the deliberative process." *State ex rel. Harper*, 691 P.2d at 830-31.

In *Eu*, 686 P.2d 609, the Supreme Court of California considered the constitutionality of a similar proposed ballot measure. The

proposed measure at issue there would have compelled the California Legislature, on penalty of loss of salary, to apply to Congress to call a constitutional convention for the purpose of proposing a balanced-budget amendment. In concluding that the proposed measure did not conform to Article V of the United States Constitution, the court stated:

> Article V provides for application by the "Legislatures of two-thirds of the several states," not by the people through the initiative; it envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise.

Id. at 613.

The California court reasoned that the purpose of that state's initiative process is to allow a means of enacting legislation, not a means of conducting public opinion polls. The court stated that the voters were not without remedy, as they had ample opportunity to make their views known to the various candidates through the campaign process. The court acknowledged that the United States Supreme Court had not yet addressed this particular issue involving Article V's proposal clause, but it found the Court's previous interpretations of Article V's ratification clause to be persuasive. Furthermore, the court cited with approval an earlier determination by the Supreme Judicial Court of Massachusetts that the reference to "legislatures" in the proposal clause, like that in the ratification clause, meant the legislative body of a state, not the whole legislative process. *Eu*, 686 P.2d at 620 (citing *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977)).

The California court further submitted that the framers of the United States Constitution knew exactly what distinction they were making in providing that only "Legislatures" were able to make application to Congress to convene a constitutional convention. Relying on the constitutional analysis in *Hawke*, 253 U.S. 221, and *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920), the court wrote:

> The framers were, of course, aware of the difference between a representative body and the electorate as a whole; they knew that a legislature is a deliberative

> body, empowered to conduct hearings, examine evidence, and debate propositions. Its members may be assumed generally to hold views reflecting the popular will, but no one expects legislators to agree with their constituents on every measure coming before that body. Yet, although undoubtedly aware that the views of a deliberative body concerning a proposed amendment might depart from those of a majority of the voters, *the framers of the Constitution chose to give the voters no direct role in the amending process;* legislatures alone received the power to apply for a national convention, and legislatures or conventions, as Congress chose, the power to ratify amendments.
>
> The only conclusion we can draw from this fact is that the drafters wanted the amending process in the hands of a body with the power to deliberate upon a proposed amendment and, after considering not only the views of the people but the merits of the proposition, to render a considered judgment. *A rubber stamp legislature could not fulfill its function under article V of the Constitution.*

Eu, 686 P.2d at 621 (footnote omitted) (emphasis added).

Most recently, the Supreme Judicial Court of Maine was asked by its house of representatives for an opinion on a proposed initiative measure comparable to the proposed Amendment 9. In *Opinion of the Justices*, 673 A.2d 693 (1996), the Maine court stated that neither the electors of that state nor the state's legislature may control the delegates to Congress in the performance of their duties, because "[s]uch an exercise of control would violate the essence of federalism." *Id.* at 696. The court recognized that once elected by the people of the state, Congressional representatives act on behalf of the nation as a whole. *Id.* In reviewing the proposed initiative under the provisions of Article V, the court held that "it is not within the power of the electors to propose a constitutional amendment. The proposed initiative, if enacted by a referendum vote, would allow the electors to do indirectly that which they are forbidden to do directly." *Id.* at 697.

These three cases from Montana, California, and Maine, along with the Supreme Court cases interpreting Article V's ratification clause, are persuasive authority for Petitioner's proposition that Article V prohibits the action proposed by the measure at hand. Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless binding on the legislators in an extortive manner as failure to heed the amendment's instructions will result in their threatened potential political deaths. Contrary to what Respondent and Intervenors contend, the proposed duties to be given to the Secretary of State by Amendment 9 are not merely ministerial; rather, they amount to substantive penalties that are equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters. If, as Respondent and Intervenors assert, the proposed measure is merely a nonbinding attempt to communicate the desire of the people for term limits, then their remedy is to voice their desires at the polls by voting for candidates who share these beliefs.

The proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures — not from the people. It is an indirect attempt to propose an amendment to the United States Constitution, and as such violates the narrow, specific grants of authority provided in Article V. The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly such that they would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue. Consequently, the measure is an impermissible use of the initiative power reserved to the people of this state in Amendment 7 to the Arkansas Constitution and is clearly contrary to law. *See Plugge*, 310 Ark. 654, 841 S.W.2d 139.

Intervenors raise the issue in their reply brief that placing the information "DISREGARDED VOTERS INSTRUCTION ON TERM

LIMITS" adjacent to candidates' names on election ballots is constitutionally permissible as a time, place, and manner regulation under the Elections Clause of Article 1, Section 4, of the United States Constitution. Because we conclude that the proposed Amendment 9 exceeds the scope of the powers reserved to the people in Amendment 7, we need not address this issue. We thus enjoin Respondent from placing the proposed Amendment 9 on the ballot, or alternatively from declaring the results. The mandate is ordered issued on Friday, October 25, 1996, unless a petition for rehearing is filed. If a petition for rehearing is filed, briefing will be on an expedited basis to be set by the clerk.

Petition granted.

GLAZE, J., concurs in the result reached.

INITIATIVE PETITION TO AMEND
THE ARKANSAS CONSTITUTION

TO THE HONORABLE SHARON PRIEST, SECRETARY OF STATE OF THE STATE OF ARKANSAS:

WE, THE UNDERSIGNED LEGAL VOTERS OF THE STATE OF ARKANSAS RESPECTFULLY PROPOSE THE FOLLOWING AMENDMENT TO THE CONSTITUTION OF THE STATE OF ARKANSAS, TO WIT: POPULAR NAME: THE CONGRESSIONAL TERM LIMITS AMENDMENT OF 1996

BALLOT TITLE: AN AMENDMENT TO THE ARKANSAS CONSTITUTION CONCERNING CONGRESSIONAL TERM LIMITS, AND, IN CONNECTION THEREWITH, SPECIFYING A PROPOSED AMENDMENT TO THE U.S. CONSTITUTION THAT LIMITS U.S. SENATORS TO TWO TERMS, FORMER AND INCUMBENT U.S. SENATORS TO ONE ADDITIONAL TERM, U.S. REPRESENTATIVES TO THREE TERMS, AND FORMER AND INCUMBENT U.S. REPRESENTATIVES TO TWO ADDITIONAL TERMS; INSTRUCTING ALL ELECTED OFFICIALS TO VOTE IN FAVOR OF SAID TERM LIMITS AMENDMENT; PLACING ON APPROPRIATE BALLOTS THE INFORMATION DISREGARDED VOTER INSTRUCTION ON TERM LIMITS NEXT TO THE NAME OF AN INCUMBENT U.S. SENATOR OR REPRESENTATIVE (EXCEPT PENDING OR AFTER RATIFICATION OF A TERM LIMITS AMENDMENT TO THE U.S. CONSTITUTION) AND NEXT TO THE NAME OF AN INCUMBENT STATE SENATOR OR REPRESENTATIVE (EXCEPT PENDING AN APPLICATION TO THE U.S. CONGRESS FOR A CONSTITUTIONAL CONVENTION, AND EXCEPT PENDING OR AFTER RATIFICATION OF A TERM LIMITS AMENDMENT TO THE U.S. CONSTITUTION) WHEN SUCH U.S. OR STATE SENATOR OR REPRESENTATIVE FAILS TO TAKE SPECIFIED ACTIONS IN SUPPORT OF SAID TERM LIMITS AMENDMENT OR WHEN SUCH U.S. OR STATE SENATOR OR REPRESENTATIVE FAILS TO TAKE SPECIFIED ACTIONS TO REJECT OPPOSITION TO SAID TERM LIMITS

AMENDMENT; ALLOWING NON-INCUMBENT CANDIDATES FOR U.S. AND STATE SENATOR OR REPRESENTATIVE AN OPPORTUNITY TO TAKE A PLEDGE IN SUPPORT OF SAID TERM LIMITS AMENDMENT; PLACING ON THE APPROPRIATE BALLOTS THE INFORMATION DECLINED TO PLEDGE TO SUPPORT TERM LIMITS NEXT TO THE NAME OF A NON-INCUMBENT CANDIDATE WHO HAS NOT SIGNED SUCH PLEDGE; INSTRUCTING ARKANSAS STATE SENATORS AND REPRESENTATIVES TO VOTE TO APPLY TO U.S. CONGRESS FOR A CONSTITUTIONAL CONVENTION TO BE HELD FOR THE PURPOSE OF PROPOSING AN AMENDMENT TO THE U.S. CONSTITUTION; AUTHORIZING THE SECRETARY OF STATE TO DETERMINE WHETHER CANDIDATES HAVE COMPLIED WITH THE TERMS OF THE AMENDMENT AND WHETHER SUCH DESIGNATIONS SHOULD BE CERTIFIED TO THE COUNTY CLERKS FOR APPEARANCE ON THE BALLOT; ALLOWING CANDIDATES LEGAL CHALLENGES TO THE SECRETARY OF STATES DETERMINATION UNDER THIS AMENDMENT TO BE FILED WITH THE SUPREME COURT OF ARKANSAS AS AN ORIGINAL ACTION; AND TO PROVIDE FOR THE REVIVAL OF UNITED STATES CONGRESSIONAL TERM LIMITS IN ARKANSAS UPON THE PASSAGE OF APPROPRIATE FEDERAL LAW.

Whereas career politicians dominating Congress have a conflict of interest that prevents them from enacting meaningful term limits and making Congress what the founders intended, the branch of government most responsive to the electorate; and

Whereas career politicians, while refusing to heed the desire of the people for meaningful term limits, emassed a nearly five trillion dollar national debt by not only voting year after year to spend far more than they have taken in, but also by voting to increase dramatically their own pay, and also providing lavish pensions for themselves and granting themselves numerous other privileges at the expense of the people; and

Whereas such irresponsible actions on the part of career

politicians have mortgaged the future of not only every American citizen, but also their children and grandchildren; and

Whereas the abuse of power, the corruption, and the appearance of corruption brought about by political careerism is ultimately destructive to representative government by making Congress increasingly distant from the people; and

Whereas the President of the United States is limited to two terms in office by the 22nd Amendment to the United States Constitution, and governors in forty (40) states are limited by those states laws to two terms or less; and

Whereas voters have established term limits for more than 2,000 state legislators, as well as 17,000 local officials across the nation, including state legislators and statewide elective officeholders in Arkansas; and

Whereas in 1992, the people of the State of Arkansas enacted, by an overwhelming majority, an amendment to the state constitution limiting service in the United States House of Representatives to three terms and in the United States Senate to two terms, and which state-imposed Congressional term limits were ruled unconstitutional by the United States Supreme Court; and

Whereas the United States Congress has ignored the desire of the people for meaningful term limits by refusing to submit to the states for ratification an amendment instituting Congressional term limits, and by proposing exceedingly long limits for its own members; and

Whereas it is the people themselves, not the United States Congress, who have in the past by majority vote, and should in the future set limits for the terms of Congressional offices; and

Whereas the people have a sovereign right and a compelling interest in the creation and preservation of a citizen Congress that will more effectively protect the freedom and prosperity of the people, which interest and right may not be as effectively served in any way

other than that proposed by this amendment to the Arkansas State Constitution; and

Whereas with foresight and wisdom our founders, under Article V of the United States Constitution, did provide the people with a procedure by which to overcome Congressional self-interest, by which procedure the people of the several states may call a convention to propose amendments to the United States Constitution when two-thirds or thirty-four (34) states expressly call for a convention; and

Whereas amendments proposed by such a convention would become a part of the United States Constitution upon the ratification of three-fourths of the states (38); and

Whereas the people of the State of Arkansas desire to amend the United States Constitution to establish term limits on Congress to ensure representation in Congress by true citizen lawmakers;

Therefore, be it enacted by the people of the State of Arkansas:

Section 1: Section 3 of Amendment 73 to the Arkansas Constitution is hereby amended to add to the current language the following subsections:

(c) The foregoing provisions in sections (a) and (b) shall be revived upon passage of appropriate federal laws.

(d) It is the official position of the people of the State of Arkansas that all of our elected officials should vote to enact, by amendment to the United States Constitution, term limits for members of the United States Congress that are not longer than: three (3) two-year terms in the United States House of Representatives, nor two (2) six-year terms in the United States Senate, respectively.

(e) It is the will of the people of the State of Arkansas that the following amendment be added to the United States Constitution:

Congressional Term Limits Amendment

Section a. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section b. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

Section c. This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

(f) (1) As provided in this subsection, and in subsections (h) and (j) of this section, at each primary, special, and general election for the office of a United States Representative, United States Senator, or any state legislator, the ballot shall inform voters regarding any incumbent and non-incumbent candidates failure to support the Congressional Term Limits Amendment proposed above.

(g) Each member of the Arkansas delegation to the United States Congress is hereby instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits Amendment set forth in subsection (e) above.

(h) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Representative or United States Senator who:

(1) Failed to vote in favor of the Congressional Term Limits Amendment proposed in subsection (e) when brought to any vote;

(2) Failed to second the Congressional Term Limits Amendment proposed in subsection (e) if it lacked for a second before

any proceeding of the legislative body;

(3) Failed to propose or otherwise bring to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above; or

(4) Failed to vote in favor of discharging the Congressional Term Limits Amendment proposed in subsection (e) before any committee or subcommittee upon which the legislator served in the respective legislative body; or

(5) Failed to vote against or reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the Congressional Term Limits Amendment set forth in subsection (e); or

(6) Failed to vote against any term limits proposal with terms longer than those set forth in the Congressional Term Limits Amendment proposed in subsection (e); or

(7) Sponsored or co-sponsored constitutional amendment or law that proposes term limits longer than those in the Congressional Term Limits Amendment set forth in subsection (e); or

(8) Failed to ensure that all legislative votes on congressional term limits were recorded and made available to the public.

(i) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of candidates for Congress if the Congressional Term Limits Amendment set forth in subsection (e) is before the states for ratification or has become a part of the United States Constitution.

(j) Notwithstanding any other provision of Arkansas law:

(1) A non-incumbent candidate for the office of United States Representative, United States Senator, state representative, or state senator, shall be permitted to sign a "term limits" pledge each time the non-incumbent files as a candidate for such an office. A candidate who declines to sign the "term limits" pledge shall have "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to the candidates name on the election ballot;

(2) Each time a non-incumbent candidate for United States Senator, United States Representative, state senator, or state representative files for candidacy for those offices, the candidate shall be offered the "term limits" pledge until the United States Constitution has been amended to limit United States Senators to two terms in office and United States Representatives to three terms in office;

(3) The "term limits" pledge that each non-incumbent candidate for state and federal legislative offices shall be offered is as follows:

"I support Congressional term limits and pledge to use all of my legislative powers to enact the proposed Congressional Term Limits Amendment set forth in the Congressional Term Limits Amendment of 1996. If elected, I pledge to act and to vote in such a way that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" will not appear next to my name."

The pledge form will provide a space for the signature of the candidate and the date of the signature.

(k) The House of Representatives of the State of Arkansas, and the Arkansas Senate, due to the desire of the people of the State of Arkansas to establish term limits for the Congress of the United States, are hereby instructed to make the following application to the United States Congress, pursuant to their powers under Article V of the United States Constitution, to wit:

"We, the people and legislature of the State of Arkansas, due to our desire to establish term limits on the members of the Congress of the United States, hereby make application to the United States Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposing amendments to the Constitution."

(l) Each state legislator is hereby instructed to use all powers delegated to each legislator to pass the Article V application to the United States Congress set forth in subsection (k) above, and to ratify, if proposed, the Congressional Term Limits Amendment set forth above.

(m) Notwithstanding any other provision of Arkansas law:

(1) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state senator or state representative who:

(a) Failed to vote in favor of the application set forth in subsection (k) above when brought to a vote; or

(b) Failed to second the application set forth in subsection (k) above if it lacked a second; or

(c) Failed to vote in favor of all votes bringing the application set forth in subsection (k) above before any committee or subcommittee upon which the legislator served; or

(d) Failed to propose or otherwise bring to a vote of the full legislative body the application set forth in subsection (k) if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the application set forth above; or

(e) Failed to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application set forth in subsection (k) above; or

(f) Failed to ensure that all votes on the application set forth in subsection (k) were recorded and made available to the public; or

(g) Failed to vote against any change, addition, or modification to the application set forth in subsection (k) above; or

(h) Failed to attend a hearing, session, or vote of the legislative body concerning any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure to attend resulted in any failure to obtain a quorum sufficient to conduct business; or

(i) Failed to move for, second, or vote in favor of a roll-call vote on any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure resulted in the defeat of any aspect of subsection (e) and subsection (k) above, without recording the votes of individual legislators to be held accountable at a later time.

(j) Failed to vote against any effort to rescind the application.

(k) Failed to vote in favor of the amendment set forth in subsection (e) above, when the amendment was sent to the states for ratification; or

(l) Failed to vote against any term limits amendment with terms longer than the limits set forth in the proposed amendment in subsection (e) above, when such an amendment is sent to the states for ratification.

(2) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" as required by any of subsections (1)(a) through (1)(j) shall not appear adjacent to the names of candidates for the state legislature if the State of Arkansas has made application to Congress for a convention for proposing amendments to the United States Constitution pursuant to this

amendment and such application is currently effective, has not been withdrawn, and has not expired.

(3) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" as required by either of subsections (1)(k) or (1)(l) shall not appear adjacent to the names of candidates for the state legislature if: the Congressional Term Limits Amendment set forth above has been submitted to the states for ratification and ratified by the Arkansas legislature; or the Congressional Term Limits Amendment set forth and proposed in subsection (e) has become a part of the United States Constitution.

(n) (1) The Secretary of State of the State of Arkansas shall be responsible for making an accurate determination as to whether a candidate for state or federal legislative office shall have placed next to the candidate's name on the election ballot the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" and for certifying the appropriate indication to the appropriate county clerks and other appropriate voting officials.

(2) The Secretary of State, in accordance with subsection (1) of this subsection, shall be responsible for making an accurate determination from any reliable source.

(3) The Secretary of State shall consider timely submitted public comments prior to making the determination required in subsection (1) of this subsection.

(4) The Secretary of State, in accordance with subsections (1), (2) and (3) of this subsection shall determine and declare what information, if any, shall appear adjacent to the names of each incumbent state and federal legislator if the incumbent were to be a candidate in the next general election and shall certify such information to the appropriate county clerks and other appropriate voting officials.

In the case of United States Representatives and United States Senators, this determination, declaration, and

certification shall be made in a fashion necessary to ensure orderly printing of primary and general election ballots with allowance made for all legal action provided in subsections (5), (6) and (7), below, and shall be based upon each Congressional member's actions during their current term of office and any actions taken in any concluded term, if such action was taken after the determination and declaration was made by the Secretary of State previously.

In the case of incumbent state legislators, this determination and declaration shall be made not later than thirty (30) days after the end of the regular session following each general election, and shall be based upon legislative action in the previous regular session or any action taken in any special session in the previous four (4) years, but in no event upon any actions taken before the adoption of this amendment.

The Secretary of State shall provide official notification to the incumbents by certified mail and to the public by official media statement and legal publication in a newspaper of statewide circulation at least two separate times prior to the election, in accordance with the time frames set forth herein.

(5) The Secretary of State shall determine, declare, and certify what information, if any, shall appear adjacent to the names of non-incumbent candidates for state and federal legislator, not later than five (5) business days after the deadline for filing for the office. The Secretary of State shall provide official notification to the candidate by certified mail and to the public by official media statement and legal publication in a newspaper of statewide circulation at least two separate times prior to the election, in accordance with the time frames set forth herein.

(6) If the Secretary of State makes the determination that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall not be certified for placement on the ballot adjacent to the name of a candidate for senator or representative for state or federal office, any candidate or elector may appeal such decision to the Arkansas Supreme Court as an original action within

five (5) business days after the second official newspaper publication of the determination by the Secretary of State or shall waive any right to appeal such decision. The burden of proof shall be upon the Secretary of State to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in this act and therefore should not have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidates name.

(7) If the Secretary of State determines that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall be certified for placement on the ballot adjacent to a candidates name for a senator or representative for state or federal office, the candidate may appeal such decision to the Arkansas Supreme Court as an original action within five (5) business days after receipt of notification or shall waive any right to appeal such decision. The burden of proof shall be upon the candidate to demonstrate by clear and convincing evidence that the candidate should not have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidates name.

(o) The Arkansas Supreme Court shall hear the appeal provided for in subsections (n)(6) and (n)(7) of this section, on an expedited basis as the first priority among any Supreme Court cases, and shall issue its decision on an expedited basis before any other civil appeals are resolved after submission of the matter to the Arkansas Supreme Court. Failure of the Arkansas Supreme Court to render a timely decision will require the Secretary of State to certify the challenged language for placement on the ballot next to the candidates name.

(p) At such time as the Congressional Term Limits Amendment set forth in subsection (e) has become a part of the United States Constitution, subsections (e) through (o) of this amendment automatically shall be repealed.

(q) Repealer. All laws in conflict with the foregoing are hereby repealed.

(r) Severability. If any portion, clause, or phrase of this amendment is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

Supreme Court, U.S.
FILED
JAN 24 1997
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Nos. 96-903, 96-919

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS TERM LIMITS, ET AL.,
Petitioners,

v.

EUGENIA T. DONOVAN,
Respondent.

STATE OF ARKANSAS,
Petitioner,

v.

EUGENIA T. DONOVAN, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT EUGENIA T. DONOVAN IN OPPOSITION

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January 24, 1997

QUESTION PRESENTED

Whether a state constitutional provision instructing state legislators to take specified actions to pass a proposed amendment to the United States Constitution violates Article V of the Constitution.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT EUGENIA T. DONOVAN IN OPPOSITION

Respondent Eugenia T. Donovan respectfully requests that this Court deny the petitions for a writ of certiorari to review the decision and judgment of the Supreme Court of Arkansas entered on October 21, 1996, and the mandate of that court issued on October 28, 1996.

COUNTERSTATEMENT

A. The Arkansas Initiative

Both petitions are far too modest about the purposes and effects of Amendment 9 to the Arkansas Constitution. Amendment 9 is not merely "[voters] expressing their views through the initiative process" (96-919 Pet. 4), and it is surely not "nonbinding" (96-903 Pet. i *et passim*). Amendment 9 is a permanent, detailed set of state constitutional "instructions" to present and future state legislators and Members of Congress from Arkansas as to how they shall vote, under every circumstance its drafters could think of, with respect to a specific potential amendment to the U.S. Constitution. If it is valid, then state legislators and Members of Congress who fail to follow these instructions are breaking state law.

Amendment 9 sets forth the full and exact text of a potential amendment to the Constitution (called the "Congressional Term Limits Amendment"; hereinafter, "CTLA") fixing term limits for service in Congress. In general, CTLA provides that no person may serve more than three terms in the U.S. House of Representatives (except that incumbents may serve not more than two additional terms); that no person may serve more than two terms in the U.S. Senate (incumbents may serve one additional term); and that there shall be "no time limit" for ratification by three-fourths of the states.

Amendment 9 commands both state legislators and Members of Congress to take specific steps to add CTLA to the Constitution. With respect to Members of Congress, it first provides, in general, that each Member from Arkansas "'is hereby *instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits Amendment* set forth . . . above.'" Pet. App. A7 (emphasis added by Arkansas

Supreme Court).[1/] It then details these "instruct[ions]," directing Members, *inter alia*, "to vote in favor of [CTLA] when brought to any vote" (*id.*); "to second [CTLA]" (*id.* at A8-9); and to take specified actions to bring CTLA out of committee for a vote of the full House or Senate (*id.*). Moreover, Amendment 9 forbids Members from supporting competing term limits proposals, directing them to vote *against* any term limits proposal with longer term limits. *Id.*

Amendment 9 also commands the whole Arkansas legislature to apply to Congress to call a constitutional convention under Article V: both houses of the state legislature "'are *hereby instructed to make the following application to the United States Congress* [the required application is then set forth verbatim]'" (Pet. App. A9)(emphasis added by Arkansas Supreme Court). Amendment 9 then details these "instruct[ions]," directing Members, *inter alia*, "to vote in favor of the application" (*id.* at A9); "to second the application" (*id.*); to vote to bring the application before committees or subcommittees and to bring it to a vote of the full legislative body (*id.* at A9-10); "to vote against any attempt to delay, table, or otherwise prevent a vote . . . on the application" (*id.* at A10); "to vote against any change" in the application" (*id.*); and "to vote in favor of [CTLA when] sent to the states for ratification" (*id.*). Like Members of Congress, state legislators are instructed to vote *against* any constitutional amendment with longer limits. *Id.* at A10-11.

Amendment 9 then says that any Member of Congress or state legislator who fails to follow any of these instructions shall have the words "DISREGARDED VOTER

[1/] References to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 96-919.

INSTRUCTION ON TERM LIMITS" printed in capital letters adjacent to his or her name on every future primary, general election, and special election ballot. *Id.* (capitals in original). The Secretary of State, an elected official, is "responsible for making an accurate determination as to whether a candidate for state or federal legislative office" shall be so branded. Pet. App. A11. The brand is apparently to be applied regardless of how long after 1996 the disobedience occurs, and in every election for the remainder of the legislator's political life, apparently even after CTLA has been added to the Constitution.

On its face, the label "DISREGARDED VOTER INSTRUCTION," with its message of disdain for voter sentiment, is a blunt and potentially very misleading instrument. There is no ballot space for an explanation that, for example, (i) the legislator's own district constituents favor what the legislator did; or (ii) the voters of Arkansas, given only a yes/no vote on a 4 1/2-page amendment, do not necessarily favor all the features of it, such as calling a constitutional convention and opposing competing term limits proposals; or (iii) the legislator believes voter sentiments have changed since 1996.

B. Decision Below

Respondent Donovan brought an original action in the Arkansas Supreme Court, alleging that the people of Arkansas do not have power to adopt Amendment 9. The court agreed, ruling that Amendment 9 is beyond the powers of the people under Amendment 7 to the state constitution because it contravenes Article V of the U.S. Constitution. Pet. App. A18.

The Arkansas Supreme Court did not rule, as the State's petition implies (96-919 Pet. 4), that Article V bars "the people

of the several states . . . from expressing their views through the initiative process in favor of particular constitutional amendments." On the contrary, the court carefully distinguished between initiatives that merely "express [voters'] views" for the guidance of legislators and initiatives that foreclose legislators' independent deliberations and decisions by ordering them to act in a specified way.

The court (which was of course interpreting a proposed *state* constitutional provision), held that Amendment 9 sets forth a binding command, enforced through state-imposed sanctions. The court said,

> It is clear from the aforementioned provisions that the proposed Amendment 9 . . . *directs* both state and federal legislators [to act in favor of CTLA]. The proposed Amendment 9 also *directs* the General Assembly to . . . ask the United States Congress to call a constitutional convention. The proposed Amendment 9 essentially provides for a vote of the people [rather than the legislature] to initiate the application process for a constitutional convention.

Pet. App. A11 (emphasis added). The state court explained further:

> Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of

> whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless *binding* on the legislators
>
> . . . .

Pet. App. A17 (first emphasis in original; second emphasis added). The Court repeated for emphasis, "The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly . . . [who] would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue." Pet. App. A17.

Turning to the question of whether these state commands violate Article V, the Arkansas Supreme Court carefully examined the precedents in this Court, the lower federal courts, and state courts, and it discerned a clear line of distinction. Initiatives and referenda that are merely "advisory" (Pet. App. A13), providing "nonbinding communication" (*id.*) as to the people's positions on proposed amendments to the U.S. Constitution, are proper. But initiatives and referenda that *command* legislatures to take specific action on constitutional amendments violate Article V, because the Framers deliberately gave the amendment functions to state and federal legislatures, not to the people of the states. Finding that Amendment 9 "clearly" (Pet. App. A17) fell on the wrong side of that line, the court ruled that it would violate Article V.

The Arkansas Supreme Court enjoined the Secretary of State from placing the initiative on the ballot. On November 2, 1996, this Court stayed the state court's decision pending consideration of petitions for certiorari.

ARGUMENT

The Arkansas court held that Amendment 9 violates Article V because it takes decisionmaking authority with respect to a specific U.S. constitutional amendment away from the state legislature, replacing its deliberative processes with fixed state constitutional "instructions" that are both legally binding and enforced by state sanctions. The Arkansas court carefully distinguished between measures that make such binding commands and measures that merely advise or inform legislators as to the positions of the voters. Its decision is consistent with the text of Article V and the decisions of this Court and all other appellate courts (with the arguable exception of one 63-year-old state-court "advisory opinion," *see infra* p. 16) and presents no issue warranting this Court's review. Moreover, Amendment 9 has other infirmities, not yet considered because this was a pre-election proceeding, including the facial unfairness and inaccuracy of the capitalized label, that make this an inappropriate case to consider the role of popular initiatives in the amendment process.

A. The Arkansas Supreme Court's Interpretation of Amendment 9 as a Command With the Force of Law Is Correct and in Any Event Dispositive.

The Arkansas Supreme Court did not hold that Article V "leave[s] the people and the popular-initiative process . . . entirely out of the federal amendatory process." 96-919 Pet. 5.

The court held, rather, that "the people" cannot take their legislatures out of the Article V process by engraving detailed binding instructions in a state constitution. The court's decision does not prevent Arkansas voters from expressing their views on term limits, insisting that candidates state their views and disclose their voting records, and voting against candidates whose views or records do not meet their approval. *See* Pet. App. A17.

The Arkansas Supreme Court's interpretation of Amendment 9 as "binding" (Pet. App. A17) is fully justified by the text of the amendment. As the court said, "This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told." Pet. App. A17 (emphasis in original). A state legislator who violates those instructions is, on the face of it, violating the supreme law of the state and his or her oath to uphold the state constitution, Ark. Const. art. 19, § 20. The state supreme court's interpretation of that constitution is of course dispositive. *See Smiley v. Kansas*, 196 U.S. 447, 455 (1905); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).[2]

Petitioners argued in the Arkansas Supreme Court, and repeat in this Court despite the state court's ruling, that the "instructions" are actually "nonbinding" under state law because the only penalty is to have "DISREGARDED VOTER

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[2] If the initiative had called merely for an advisory expression of voter sentiment regarding CTLA, it would not have been authorized as a matter of state law under Amendment 7 to the Arkansas Constitution, under which its proponents proceeded. That Amendment provides, in pertinent part, "the people reserve to themselves the power to propose legislative measures, laws and amendments to the [state] Constitution." *See* Pet. App. A3. The initiative would not have complied with Amendment 7 unless its purpose had been to amend the written positive law of the state.

INSTRUCTIONS ON TERM LIMITS" placed next to one's name on all future election ballots. At best this is a very red herring. The instructions are stated in mandatory terms. A state legislator (or Member of Congress) who violates them is disobeying the Arkansas Constitution. Conscientious legislators do not violate specific constitutional commands, whether the penalty is heavy or light.

Moreover, the threat of being identified by the Arkansas Secretary of State as having "DISREGARDED VOTER INSTRUCTIONS ON TERM LIMITS" plainly is, as the Arkansas Supreme Court said, "extortive" rather than educational. Pet. App. A17. As that court held, the brand is "equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters." *Id.* Moreover, considered as a disclosure, the phrase is highly misleading: a legislator who disobeys one of Amendment 9's commands may not be ignoring voter sentiment at all. For example, a state legislator may well have OBEYED THE WISHES OF VOTERS IN HIS DISTRICT, but there is no equivalent opportunity to say so.[3/] A Member of Congress or

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[3/] In his Chambers Opinion in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), Justice Rehnquist wrote with greater precision:

> If each member of the Nevada legislature is free to obtain the views of constituents *in the legislative district which he represents*, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort.

Id. at 1388 (emphasis added). We do not mean to enter into the complex questions of where a legislator's loyalties properly lie, or the right of a state to resolve issues on a statewide referendum basis. Our only point is that the label as written is so misleading as to be obviously punitive, because a

(continued...)

state legislator who votes *for* an alternative term limits proposal (which Amendment 9 commands her to oppose) may have OBEYED THE WISHES OF VOTERS WHO ALSO SUPPORT LONGER TERM LIMITS PROPOSALS.[4] And the implication that the voters of Arkansas favor CTLA may be wholly false on some future date when the legislator acts, or in 1998 (or 2098) when the label is applied. Thus, for any number of reasons, a legislator may be branded for "DISREGARD OF VOTERS" without contravening voter wishes at all: what he or she would have violated is the command embedded in the state constitution.

B. The Arkansas Supreme Court's Interpretation of Article V Is Correct and Consistent With This Court's Decisions.

The Arkansas Supreme Court ruled that Article V does not permit a state to allow its people directly to dictate state ratification of amendments to the U.S. Constitution, or state applications for a constitutional convention, although the

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[3] (...continued)
legislator who votes against CTLA could be obeying the wishes of a majority — or even 100% — of his or her own constituents.

[4] There has been a struggle within the term limits movement as to the appropriate limits, with some proponents favoring allowing longer but still limited service. *See, e.g.*, David Hess, "Gingrich Pledges To Fight Term Limits of Less Than 12 Years," *Phila. Inquirer*, Jan. 12, 1995, at A9 (describing disagreements among advocates of six-, eight-, and twelve-year limits for U.S. Representatives). Obviously, one faction succeeded in inserting its particular view into Amendment 9. Arkansas voters were given only a yes/no choice on the whole detailed Amendment. There is no reason to assume that voters who supported Amendment 9 would have voted "no" on a different term limits proposal, or that legislators who vote "yes" on such a proposal are disregarding actual voter sentiment.

people may of course express their views on these subjects in a nonbinding fashion. This ruling was correct: Article V assigns responsibility for ratification and convention applications to state "Legislatures." The state court's distinction between a command and a nonbinding expression of voter opinion is fully consistent with the constitutional text and the pertinent cases.

Article V provides that a constitutional amendment proposed by two thirds of both Houses of Congress becomes effective "when ratified by the Legislatures of three fourths of the several States"; Article V further provides that "on the Application of the Legislatures of two thirds of the several States," Congress shall call a Convention for proposing Amendments.

As the Arkansas court noted (Pet. App. A12), this Court squarely held long ago that Article V uses the term "Legislatures" in its ordinary sense, well understood in 1787, to refer to a state's representative lawmaking body or bodies. In *Hawke v. Smith*, 253 U.S. 221 (1920), the issue was whether the Ohio General Assembly's ratification of a proposed amendment to the U.S. Constitution could be subjected to a popular referendum, as required by the Ohio constitution. The Court's answer was no. The Court held that the term "Legislatures" is to be given its plain meaning:

> The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of

> interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning.

Id. at 227. The Court noted that the Framers' use of the word "Legislatures" was not casual but reflected a careful distinction between action of a representative body and direct action by the people of a state:

> The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people
>
> . . . .

Id. But the Framers deliberately decided against that course:

> There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.

Id. at 228. The Framers wanted, as the Court noted, to assure that the function of amending the Constitution was committed to deliberative bodies. *See id.* at 226 (purpose of assigning amendment role to Congress and state legislators was to "secur[e] deliberation and consideration before any change can be proposed").

The *Hawke* Court then addressed the question whether the State was nevertheless free to allocate the ratification power to the people as a whole acting directly, as the state could with

respect to state legislative power. The Court answered that question in the negative, because the task of ratification is *not* a state legislative power, which the people of the state are free to allocate, but a task created by the Constitution itself and assigned directly to state "Legislatures":

> [R]atification by a state of a constitutional amendment is not an act of legislation . . . .
>
> . . . .
>
> It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

Id. at 229-30. *See also id.* at 227 ("It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.").

Finally, a state cannot evade Article V by having its legislature carry out the bare formalities of ratification or "Application" under the specific and legally binding command of a "direct action of the people." This follows from *Leser v. Garnett*, 258 U.S. 130 (1922), which held that the 19th Amendment had been validly adopted even though "the constitutions of several of the [ratifying] states [contained] provisions which render inoperative the alleged ratifications by their legislatures." *Id.* at 137. The Court said,

> [T]he function of a state Legislature in ratifying a proposed amendment to the

> Federal Constitution, . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.

Id.[2] As the California Supreme Court explained in *AFL-CIO v. Eu*, 686 P.2d 609, 620 (1984), "If a state cannot constitutionally prohibit its legislature from proposing or ratifying a constitutional amendment, by implication it cannot compel the legislature to do so."

C. The Arkansas Supreme Court's Decision Does Not Conflict With Other Appellate Decisions.

In sum, the Arkansas Supreme Court ruled that Amendment 9 is invalid as "nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state." Pet. App. A17. It distinguished Amendment 9 from "merely a nonbinding attempt to communicate the desire of the people for term limits," *id.*, and plainly would not have invalidated the latter.

This distinction is consistent with a large number of federal and state precedents, many of which the state court examined and discussed. For example, Justice Rehnquist, in his Chambers Opinion in *Kimble v. Swackhamer*, 439 U.S. 1385

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[2] *Cf. U.S. Term Limits, Inc. v. Thornton*, — U.S. —, 115 S. Ct. 1842, 1855 (1995); *id.* at 1875 (Kennedy, J., concurring). The process of ratifying amendments to the Constitution, like the process of electing Members of Congress, is a process created and provided for by the Constitution itself.

(1978), drew the same distinction in declining to grant relief against a Nevada "advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature." *Id.* at 1386. Noting that the state referendum expressly provided that "'the result of the voting on this question does not place any legal requirement on the legislature or any of its members,'" *id.*, the Justice distinguished *Hawke* and *Leser* and said "I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort." *Id.* at 1388.[9]

In *AFL-CIO v. Eu*, *supra*, the California Supreme Court drew the same distinction within a single initiative. It invalidated a portion of the initiative stating that "The People of the State of California hereby mandate that the California Legislature adopt the following [Application to Congress to call a constitutional convention to consider a balanced budget amendment]," 686 P.2d at 612, ruling that "pro forma action by a state legislature, acting under compulsion of an initiative measure, is [not] sufficient to comply with article V." *Id.* at 620. But it held that a separate portion of the initiative "which merely petitions Congress to adopt a balanced budget amendment" was valid. *Id.* at 622.

Other cases are consistent. *See, e.g., Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (voter initiative "directing" state legislature to apply for constitutional convention regarding term limits violates Article V); *State ex*

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[9] The Nevada Supreme Court also approved the referendum only because it was expressly advisory. *See Kimble v. Swackhamer*, 584 P.2d 161, 162-63 (Nev. 1978). The court made clear it would not have done so had the referendum been binding. "Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of Article V." *Id.* at 162 n.2.

rel. Harper v. Waltermire, 691 P.2d 826, 830 (Mont. 1984) (initiative amending state constitution to direct legislature to call for convention on balanced budget amendment and sit in perpetual session until it does is invalid; "whenever a state legislature acts to amend the United States Constitution . . . the body must be a deliberative representative assemblage acting in the absence of any external restrictions," and initiative that "attempts to direct and orchestrate" process violates Article V); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933) (invalidating bill authorizing popular conventions to pass on legislature's ratification of amendments); *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920) (refusing to allow voter referendum on conclusiveness of legislature's ratification of Eighteenth Amendment); *Decher v. Vaughan*, 177 N.W. 388 (Mich. 1920) (same).

Petitioners lay great stress on one arguably contrary opinion, *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933). In proposing the 21st Amendment for ratification by the states, Congress exercised its Article V power to call for ratification by state conventions rather than state legislatures. A proposed Alabama statute would have required that delegates to that state's convention pledge to follow the result of a statewide vote. The Alabama court rendered an advisory opinion that this provision would be constitutional, stating in essence that such delegates should reflect popular sentiment. This advice dealt with a situation quite different from the present case: it covered a one-time advance pledge on a yes/no question, and the pledge was part of the *ad hoc* groundrules devised for the conduct of a special state convention; it is by no means clear that the Alabama court would have given the same advice with respect to permanent commands in the state's constitution, addressed to the state legislature, applicable without regard to

any precise correspondence to voter sentiment, and enforced by a state sanction. But in any event, this unlitigated advisory opinion, which could not have been reviewed in this Court and has been distinguished by later decisions,[7] does not create a conflict that requires this Court's resolution.

D. The History of Referenda Furthering Popular Involvement in the Election of Senators Is Not Inconsistent With the Arkansas Supreme Court's Decision.

The private petitioners suggest that the Arkansas Supreme Court's ruling "is at odds with a well-established tradition of nonbinding instructions by voters to their elected officials" (96-903 Pet. 14), citing several states' turn-of-the-century efforts to encourage state legislators to follow popular recommendations when choosing United States Senators. But the Arkansas Supreme Court rejected no such principle; on the contrary, as noted above, the court recognized that nothing would bar "a mere advisory referendum or a nonbinding communication between legislators and citizens." Pet. App. A13. The court invalidated Amendment 9 because it found the amendment's instructions, backed by the sanctions of the Secretary of State, to be binding.

The historical evidence petitioners cite is inapposite. Before the 17th Amendment was adopted, various state popular initiatives sought to encourage state legislatures to exercise their Article I, Section 3 power to select candidates favored by the people. But none of these initiatives contained instructions to propose, ratify, or make "Application" with respect to the

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[7] *See, e.g., AFL-CIO v. Eu*, 686 P.2d at 705-06.

17th Amendment itself, and none presented or could have presented any question under Article V. This Court decided *Hawke v. Smith*, *supra*, in 1920, just seven years after the 17th Amendment was ratified. Far from endorsing any popular role in the formal adoption of that Amendment, the Court said, "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." 253 U.S. at 228. Amendment 9 to the Arkansas Constitution attempts to do exactly what the states at the turn of the century never did: order state legislators to take specified actions under Article V to bring about and pass a particular proposed constitutional amendment.

E. Amendment 9's Other Infirmities Make This Case an Inappropriate Vehicle for Considering the Proper Interpretation of Article V.

Under Arkansas law, in a *pre*-election proceeding, respondents could challenge Amendment 9 only on the ground that it was not within the scope of the state's initiative procedure. State and federal constitutional challenges to the merits of the proposal itself could not be brought until after the election.[8]

Amendment 9 has other obvious infirmities. It allows one elected official, holding partisan office, to apply a crippling label to other candidates for office. It discriminates between candidates who have had actual occasion to violate one of its

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[8] *See Plugge v. McCuen*, 841 S.W.2d 139 (Ark. 1992). The Arkansas court's ultimate holding in the present case was that the "procedure" set forth in Amendment 9 was not "encompassed within the powers reserved to the people of this state by Amendment 7."

many rules and candidates who may oppose term limits but have not had any opportunity to confront the rules. It imposes a lifetime barrier to election, which the Secretary of State does not have any official discretion to remove even if the candidate's view and conduct or the public circumstances have changed. It purports to "instruct" Members of Congress. And for reasons made clear at pp. 9-10, *supra*, the label "DISREGARDED VOTER INSTRUCTION . . ." is hopelessly inexact, misleading, and unfair.

Such a measure is vulnerable to a wide range of challenges under the Arkansas Constitution[2] as well as the Time, Place and Manner Clause and the First and Fourteenth Amendments to the Federal Constitution. Election regulations are supposed to prevent "voter confusion," *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), not enhance it. They are supposed to be "generally applicable and evenhanded," *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). And they are supposed to be nondiscriminatory. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tasjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

The very unfairness of Amendment 9 to state legislators and Members of Congress would necessarily distort the Court's consideration of the amendment's compliance with Article V. If the Court wishes to give further consideration to the proper role of state popular initiatives in bringing about the adoption of amendments to the Constitution, the Court should await a state initiative that is not so obviously vulnerable on a variety of other grounds.

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[2] *See, e.g.*, Ark. Const. art. II, § 3 (equal protection), *id.* § 8 (due process); *id.* § 18 (equality of privileges and immunities).

CONCLUSION

The petitions for a writ of certiorari should be denied.

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No. 96-919

In The

Supreme Court of the United States

October Term, 1996

STATE OF ARKANSAS,

Petitioner,

v.

EUGENIA T. DONOVAN, ARKANSAS TERM LIMITS, FRANK GILBERT, AND SPENCER G. PLUMLEY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF AMICUS CURIAE OF THE STATES OF NEBRASKA, COLORADO, SOUTH CAROLINA AND SOUTH DAKOTA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case involves the right of the people of the States to require that ballot information be provided to voters when such information relates to specific action taken by State and Federal legislators regarding an amendment to the United States Constitution.

As Attorneys General of our respective States we respectfully request this Honorable Court grant certiorari in the above titled case. The Court should resolve this critical issue as soon as possible in order to avoid leaving a patchwork of laws throughout the country regarding the power of the people to place information on ballots. As Attorneys General of our respective States, we will likely be, and in some cases have already been, called upon to defend, interpret or otherwise provide advice concerning provisions similar to that passed by the people of Arkansas.

The Court should resolve this important issue in favor of the State of Arkansas in order to preserve government of the people, by the people and for the people, and because a contrary decision would disregard the historical practice in the States regarding the placement of language on the ballot concerning the adoption of amendments to the United States Constitution.

SUMMARY OF ARGUMENT

At issue in this case is the right of the people of the States to express their collective will to their elected representatives as to a proposed amendment to the

United States Constitution. The provision in question expresses the will of the people as to the adoption of a federal term-limits amendment and does not usurp the authority of the State Legislatures or Congress to propose constitutional amendments or make application for a constitutional convention. The Arkansas amendment is a nonbinding advisory instruction to legislators and members of Congress expressing the wishes of the State's voters. Unlike previously invalidated provisions in other States, the amendment would not affect the salary of legislators nor would it limit, proscribe or mandate the terms of debate or deliberation.

Under the amendment, ratification would still depend on the vote of the State Legislatures. A State's elected representatives could still vote however they deem appropriate. Their current term of office would not be affected in any manner, nor would any punitive measure of any kind be imposed during their term of office. The only consequence of failing to follow the voters instructions under the amendment is to have factual information placed on the ballot at the next election informing voters of the position of the candidates who are seeking a new term in office.

Extensive historical precedent involving the use of ballot language to inform voters of candidate's positions on constitutional amendments, including the Seventeenth Amendment, demonstrates that such expressions of popular will have never been thought to violate Article V. On the contrary, such expressions of the people's will are legitimate means to communicate with elected representatives in order to ensure government of the people, by the people and for the people.

ARGUMENT

I. BACKGROUND

In 1995, the Court invalidated term limit amendments adopted by the voters of twenty-three (23) States. *U.S. Term Limits v. Thornton*, ___ U.S. ___, 115 S.Ct. 1842 (1995). The Court concluded that an amendment to the U.S. Constitution would be required before term limits could be imposed on members of Congress. *Id.* at 1871. Subsequently, a movement to encourage adoption of such an amendment began nationwide. On November 5, 1996, the voters of the State of Arkansas approved a state constitutional "term limits" amendment by a 61% to 39% margin. The voters of the States of Nebraska, Alaska, Colorado, Idaho, Maine, Missouri, and South Dakota also passed similar amendments at the same election (hereinafter the "Amendment"). The Amendment instructs each State's legislators and members of Congress to use the powers of their offices to support an actual Congressional term-limits amendment to the United States Constitution. The Amendment also requires the Secretary of State of each state to place statements on the next election ballot informing voters whether candidates have failed to take specific action supporting a federal term-limits amendment. This ballot language provision is similar to a method utilized by a number of States early in this century to encourage adoption of the Seventeenth Amendment which instituted direct election of U.S. Senators. *See, e.g.*, 1909 Laws of Neb., ch. 51, at 253.

Prior to the November 1996 election, term limit opponents in Arkansas challenged the Amendment, and the

Arkansas Supreme Court held that the Amendment violated federal constitutional provisions contained in Article V of the U.S. Constitution pertaining to the method of proposing constitutional amendments. *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996). This Court, however, granted a stay of the decision on November 2, 1996, (on a 7-2 vote) and the election proceeded. *Arkansas Term Limits v. Donovan*, 117 S.Ct. 380 (1996). The State of Arkansas and Arkansas Term Limits are now seeking review of this matter. The outcome of the case may well decide the future of the term limits movement.

II. ARTICLE V DOES NOT PROHIBIT THE PEOPLE FROM EXPRESSING THEIR COLLECTIVE WILL TO THEIR LEGISLATORS.

The issue for which review is sought is whether, consistent with Article V of the United States Constitution, the people of a State may issue instructions to their State legislators and Congressional delegation directing them to use the powers of their offices to support a term-limits amendment to the United States Constitution, and whether the people may place on the ballot information about the absence of such support.

When the Arkansas Supreme Court reviewed this matter it framed the issue as "whether [the] Amendment . . . reserves to the *people* of the State of Arkansas the power to propose amendments to the United States Constitution and to make application to Congress for a constitutional convention." *Donovan v. Priest*, 931 S.W.2d at 125. (emphasis added). The court found that the amendment violated the provision in Article V of the U.S.

Constitution that all proposals of amendments to that Constitution must come either from *Congress* or state *legislatures* – not directly from the *people*. *See Hawke v. Smith*, 253 U.S. 221 (1920).

The correctness of the Arkansas Supreme Court's decision, and thus the constitutionality of the Amendment, depends upon whether the Amendment usurps the authority of the State Legislatures and the Congress to propose constitutional amendments and make application for a constitutional convention, or whether it merely expresses the will of the people without compelling a course of action.

When one examines the text of the Amendment and compares it to the provisions at issue in the cases cited by the Arkansas Supreme Court, it becomes clear that the Arkansas Supreme Court's decision is erroneous. Its conclusions are based on false premises and mischaracterizations. The court's decision is premised on its assertion that the Amendment is no different than invalidated provisions in other States which cut legislative salaries or forced perpetual legislative sessions if legislators failed to adopt a specific proposal. The court concluded that the Amendment allows the people to usurp the authority of Congress and State Legislatures. *Donovan v. Priest*, 931 S.W.2d at 127. On the contrary, the Amendment is a *nonbinding* instruction to legislators and members of Congress expressing the wishes of the State's voters. Such expressions of the people's will are not unconstitutional. *See Kimble v. Swackhamer*, 439 U.S. 1385, 1387 (1978) (Rehnquist, J. as Circuit Justice). Under the Amendment, ratification would still depend on the vote of the State Legislatures. A State's elected representatives could still

vote however they deem appropriate. Their current term of office would not be affected in any manner. Their salary would not be affected. *Compare AFL-CIO v. March Fong Eu*, 686, P.2d 609 (Cal. 1984) (invalidating initiative calling for legislature to seek federal balanced budget amendment on penalty of loss of salary). No punitive measure of any kind would be imposed during their term of office. No debate or deliberation would be limited, proscribed or mandated. *See State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829 (1984) ("The stricken ballot measure would compel the Legislature to reach a specific result under threat of confinement and no pay.").

The only consequence of failing to follow the voters' instructions under the Amendment is to have factual information placed on the ballot at the next election informing voters of the position of the candidates who are seeking a *new* term in office.

The Arkansas Supreme Court characterized this descriptive ballot language as "threatened political death." However, the effect, if any, relates only to a *future* term of office – something to which no candidate (incumbent or otherwise) has an entitlement. (Compare, e.g., resign-to-run laws; laws prohibiting primary losers from running in the general election by petition; state term limit laws; campaign finance disclosure laws; political primary rules; minimum primary vote requirements, etc.).

Expressions of popular will cannot be equated with usurping the constitutional authority of the Congress or State legislatures. In *Hawke v. Smith*, 253 U.S. 221 (the case relied upon most heavily by the Arkansas Supreme

Court), the Court discussed the impermissibility of ratification of constitutional amendments directly by the people rather than by the Legislature. To support its position that a "Legislature" is a representative body and does not include a referendum by the people, the Court referred to the process for the adoption of the then recently ratified Seventeenth Amendment which provided for the direct election of U.S. Senators by a vote of the people. "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." *Id.* at 228. The legal significance of this statement is apparent upon review of its historical context.

As the Court was unquestionably aware, the ratification of the Seventeenth Amendment was accomplished with the aid of numerous state laws similar in purpose to the Amendment now at issue in this case. *See, infra, Section B.* In fact, by 1912, 29 of the 48 states had provisions in place for selecting the people's choice for U.S. Senator. *See* Ronald R. Rotunda, *The Aftermath of Thornton*, 13 Const. Comm. 201, 207 (Summer 1996). In light of the Supreme Court's choice of the ratification of the Seventeenth Amendment as an example, it seems clear that while the Court saw direct ratification of constitutional amendments by means of a popular referendum as impermissible, it saw nonbinding "instructions" to legislators and ballot language provisions as being in a different category.

Furthermore, it can hardly be assumed that voters would not be made aware of candidates' positions on term limits during a campaign anyway. Failure of an

elected official to follow voter instructions regarding term limits would be "political death" only if the *voters* wanted it to be. Under the Amendment, as in *Kimble v. Swackhamer*, 439 U.S. at 1388, "each member of the . . . Legislature is free to obtain the views of constituents in the legislative district which he represents. . . . " The Arkansas Supreme Court apparently assumes that voters cast their ballots based on only one issue, and that they will automatically vote against term limit opponents. History shows, however, that many anti-term limit candidates are elected or re-elected despite overwhelming support for term limits in their States. Thus, what political impact such ballot language may have is not only speculative, but is beyond the proper scope of judicial review under Article V.

In sum, the Arkansas Supreme Court apparently believes that providing factual information to voters so that they can intelligently exercise their elective franchise amounts to "threatened political death." Some, however, would simply call this participatory democracy. In any event, nothing in Article V of the U.S. Constitution prohibits the people from expressing their collective will, and then holding their representatives accountable in future elections as to whether they acted to implement the people's wishes. *Kimble v. Swackhamer*, 439 U.S. at 1387 (1978).

A. States Have Previously Used The Ballot To Provide Voters With Information Regarding A Candidate's Position On Constitutional Amendments.

Article V of the United States Constitution has not historically been interpreted as preventing the placement of information on the ballot when such information relates to a constitutional amendment.

The matter of candidates' positions on constitutional amendments has long been a vital component in American politics and has historically been part of the candidate selection process.[1] Indeed, States utilized ballot

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[1] The 1996 Republican Party Platform established as one of its principles, a "Balanced Budget Amendment to the Constitution." *The Republican Party Platform 1996*, at 3. Throughout the course of the history of this country, the various parties have supported various constitutional amendments in their party platform. These can be found in *National Party Platforms*, University of Illinois Press. A few selections from volume II of that collection include: Socialist Party Platform of 1960 (Constitutional amendment guaranteeing the right of ready ballot access in all states to minority political parties) at 630, Democratic Party Platform of 1964 (Constitutional amendment giving the District of Columbia voting representation in Congress) at 648, Republican Party Platform of 1964 (Constitutional amendment regarding free exercise of religion and apportionment of one state house on factors other than population) at 683, and 686, American Independent Platform of 1968 (Constitutional amendment requiring federal district judges to face retention elections) at 702, Democratic Platform of 1968 (Constitutional amendment giving the District of Columbia voting representation in Congress) at 741, American Platform of 1972 (Constitutional amendment regarding the election of federal district judges and other judicial changes) at 770.

information to ratify the Twenty-First Amendment which is the only amendment to the United States Constitution ratified by state conventions. The State of Alabama, for example, in order to ensure proper voting on the passage of the Twenty-First Amendment, provided that those eligible to attend the convention for ratification must sign a pledge to abide by the non-binding vote of Alabama's voters. In *In re Opinion of the Justices*, 148 So. 107, 109-10 (Ala. 1933), the Alabama Supreme Court, upheld this legislation noting that

> [k]eeping in view the fundamental doctrine of a government of the people, by the people, and for the people, we are unable to see in the Federal Constitution any purpose to prohibit a direct and binding instruction to the members of the convention voicing the consent of the governed, . . .

Id. at 111. Thus, Alabama, like many other States, elected its convention delegates, knowing that they were pledged to act as the Alabama voters had requested.

In other States as well, the nomination of delegates to ratifying conventions for amendments to the United States Constitution require candidates to include a statement in their petition regarding whether they oppose or favor ratification of the proposed amendment. In Arizona, for example, nominations for delegates to State ratifying conventions for amendments to the United States Constitution must be without party or political designations. However, the nomination petitions must have a statement by the candidate that the candidate either favors or opposes ratification of the amendment to the U.S. Constitution. Furthermore, a delegate who is

elected based on a platform or nomination petition statement favoring or opposing ratification must vote in accordance with that platform or statement at the convention; otherwise, that delegate is guilty of a misdemeanor, and the delegate's vote will not be considered.[2]

In the State of Washington, candidates for election as a delegate to a ratifying convention must file a "declaration of candidacy." This "declaration" must include a

> sworn statement of the candidate that he is either for or against, as the case may be, the amendment which will be submitted to a vote of the convention and that he will, if elected as a delegate, vote in accordance with his declaration. The form shall be so worded that the candidate must give a plain unequivocal statement of his views as either for or against the proposal upon which he will, if elected, be called upon to vote.[3]

The approach taken by States like Alabama with respect to the Twenty-First Amendment, and with States like Arizona and Washington with respect to ratifying conventions for constitutional amendments was not and is not unique. A similar technique had been used by the

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[2] Ariz. Rev. Stat. Ann. §§ 16-703(C), 16-704(A), 16-705(C) (1996).

[3] Wash. Rev. Code § 29.74.060 (1993).

For states with similar provisions *see* **Del.** Code Ann. tit. 15, § 7706; **Fla.** Stat. Ann. § 107.04(1) (West 1997 Cum. Supp.); **Idaho** Code Ann. § 34-2205 (Michie 1995); **Ind.** Code §§ 3-10-5-7 and 3-10-5-9 (Michie 1996); **Mont.** Code Ann. § 13-26-103 (1995); **Ohio** Rev. Code Ann § 3523.04 (Anderson 1996); **S.D.** Codified Laws § 2-15-4 (Michie 1992); **Utah** Code Ann. § 20A-15-103 (Michie 1995); **Vt.** Stat. Ann. Title 17, § 1814 (Equity 1982).

States as a means for getting the Seventeenth Amendment passed.

B. Common Practice Leading To The Seventeenth Amendment Contradicts the Arkansas Supreme Court's Decision.

By the late 1800's, there was growing discontentment among the states regarding the selection of United States Senators by State legislatures, rather than directly by the people. Despite this evident discontentment, Senators, who owed their position to the State legislators, rather than the people, failed to send a proposed amendment calling for the direct election of United States Senators to the States. This was in spite of the fact that the United States House of Representatives had passed such an amendment several times before. Due to the Senate's continuing failure to act upon the increasing popular demand for the direct election of Senators, the States were forced to take action.

The State of Oregon established the precedent that other states followed when, in 1904, Oregon adopted a "direct" primary law through the people's Initiative and Referendum power. Candidates who wanted to have their name placed on the primary election ballot for the nomination for an office had to file a petition in which the candidates were allowed to include a statement not to exceed one hundred words, and on the ballot, after the candidate's name, a statement not to exceed twelve

words which would convey to voters the candidate's "measures or principles he especially advocates."[4]

Upon being nominated, besides having a statement regarding the principles that the nominated candidate supported and would advocate, the candidate could also sign his name to one of two statements which would appear on the ballot by the candidate's name. Statement Number 1 read,

> I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office, I shall always vote for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress without regard to my individual preferences.

Statement Number 2 read,

> During my term of office I shall consider the vote of the people of the United States Congress as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so seems to me to be sufficient.[5]

Moreover, in 1908, supporters of the direct election of Senators submitted another bill to the people of Oregon by way of the Initiative which passed. This bill stated:

> Be it enacted by the people of the State of Oregon: SECTION 1. That we, the people of the

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[4] 45 CONG. REC. 5823, 5826 (1910).

[5] Oregon Primary Law, 1904.

> State of Oregon, hereby instruct our representatives and senators in our legislative assembly, as such officers, to vote for and elect the candidates for United States Senators from this State who receive the highest number of votes at our general election.

With the passage of this bill, the people of Oregon succeeded in conveying their choice for U.S. Senator to the Oregon State legislature and in having the Oregon State legislature vote for the people's choice.

In addition to Oregon, the State of Idaho enacted a primary election law in 1909. Idaho's primary election law allowed candidates for the nomination for state legislative office to sign a "declaration" with their nomination papers which stated, in part, that if elected to the state legislature, the candidate would "always vote for the candidate for the United States Senator who has received a majority for the first choice votes upon my party ticket . . . "[6] If the candidate made such a declaration on the nomination papers, on the official primary ballot near the candidate's name would appear, "Pledged to vote for party choice for U.S. Senator."[7]

Nebraska took a similar step in its primary election law when it allowed candidates for the state legislature to sign a Statement Number One or a Statement Number Two identical to Oregon's on their nominating petitions. Candidates who signed Statement Number One would have printed after their names, "Promises to vote for the

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[6] Idaho Session Laws, House Bill No. 16 (1909).

[7] *Id.*

people's choice for the United States Senator." The candidates who had signed Statement Number Two would have printed after their names, "Will not promise to vote for people's choice for United States Senator."[8]

Similarly, under Illinois' Primary Election Law of 1909, section 29, for candidates for the U.S. Senate who wanted to have their names appear on the primary ballot, the last sentence of Section 29 provided, "that the vote upon candidates for United States Senator shall be had for the sole purpose of ascertaining the sentiment of the voters of the respective parties in the State as a whole and not by Senatorial districts."[9]

North Dakota had a similar provision. In *State v. Blaisdell*, 118 N.W. 141, 145 (N.D.1908), the North Dakota Supreme Court upheld the provisions of North Dakota's primary election law which allowed the voters of each party to express their choice for Senator. The court stated, "It merely permits an expression of choice by the voters, and its provisions, in effect, provides a convenient method of exercising the constitutional right of petition." *Id.* at 147.

Furthermore, in *State v. Fear*, 125 N.W. 961 (Wis. 1910), the Wisconsin Supreme Court ruled that the Wisconsin primary law did not require the candidates to pledge themselves to support any particular nominee. The Wisconsin Supreme Court concluded that,

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[8] 1909 Laws of Neb., ch. 51, at 253.

[9] 1909 Ill. Laws 46, 58-59.

> Construing the law as imposing no legal obligation on the part of any member of the Legislature to vote for his party nominee at the primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the Constitution has been transgressed.

Id. at 972. Finally, like the North Dakota Supreme Court, the Wisconsin Supreme Court referred to the citizens' right to petition. The court explained that every citizen had a right to tell the legislature who their choice was for Senator and to ask the legislature to choose that candidate. Although imposing no obligation on the state legislators to follow what their constituents' choice was, the court noted that the state legislators should consider such information "advisory." *Id.*

These provisions adopted by the various States ultimately led to the proposal and ratification of the Seventeenth Amendment, arguably the last amendment adopted where the interests of the politicians were directly adverse to that of the citizenry.

In sum, the people of the States sometimes wish to use ballot information in order to allow voters to cast informed votes on important issues. When the voters use ballot information that does not involve otherwise unconstitutional discrimination, it should be permitted. The historical precedent established prior to the passage of the Seventeenth Amendment, as well as current State

practice regarding the nomination of delegates to ratifying conventions, demonstrate that no constitutional barrier has heretofore been thought to prevent the people from requiring that information be provided to voters regarding candidates' positions on constitutional amendments.

C. Descriptive Ballot Language Is Commonly Used By The States And Takes On Many Forms.

In analyzing the issue in this case, one must avoid the temptation to confuse familiarity with constitutional law. It should be noted that the very existence of a state-printed ballot is a legislative innovation of the States. As this Court has pointed out, "until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888 . . . Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties." *Burdick v. Takushi*, ___ U.S. ___, 112 S.Ct. 2059, 2070 (1992).

As to ballots for Congressional elections, Article I, § 4, cl. 1 of the U.S. Constitution provides that States may prescribe "The Times, Places and Manner of holding Elections for [U.S.] Senators and Representatives. . . . " This provision expressly authorizes the States to regulate the manner of its elections for members of Congress. *See Burdick v. Takushi*, 112 S.Ct. 2059, 2063 (1992). Under this provision, how States conduct their elections is within their discretion so long as they do not violate some other provision of the U.S. Constitution. *See infra, Section II. See also U.S. Term Limits*, 115 S.Ct. at 1868 (invalidating ballot

access restrictions deemed to constitute additional qualifications in violation of Article I); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 222 (1989).

The amendment in question states in its opening clause that its purpose is to inform voters regarding candidates' positions on Congressional term limits. States may generally enact ballot regulations which help the electorate make informed decisions. In fact, this Court has held that " *'there can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will. . . .'* " *Tashijian v. Republican Party of Connecticut*, 479 U.S. 220, 107 S.Ct. 544, 551 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. at 796) (emphasis added). Significantly, the Court made this statement in the context of its discussion of the role of political party labels on election ballots. Political party labels are themselves a form of descriptive ballot language. The Court noted that "to the extent that *party labels provide a shorthand designation of the views of party candidates on matters of public concern*, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Id.* at 552 (emphasis added). *See also Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 200 (8th Cir. 1996), *cert. granted* 116 S.Ct 1846 (1996) ("The Supreme Court has recognized that party labels provide a shorthand designation of the views of party candidates on matters of public concern. . . . ").

Descriptive ballot language in the form of political labels is placed on ballots in every partisan political race by State statute. *See, e.g.*, Neb. Rev. Stat. §§ 32-809, 814, 815 (1994). Many State laws provide that nonpolitical

candidates go on the ballot only as individuals, while political candidates are listed with their party label and petition candidates are designated on the ballot as having been nominated by petition.

It is important to note that political parties are not part of our constitutional framework, and have no constitutional basis beyond the right of political association. Placement of party labels on ballots is a form of descriptive language meant to inform voters. Voters have long been accustomed to descriptive language such as "Democrat" or "Republican" following candidates' names. Some past political party names were even more descriptive, such as "Free Silver", "Socialist Workers", "People's Independent", or "Prohibition." New party names are also often descriptive, such as "Reform" and "Green." A candidate could, if otherwise qualified, run on the "Term Limit" ticket or the "Experience Counts" ticket. Party names are intentionally chosen to convey a message to voters. In the case of the major parties, they provide the voter at least a general idea of where the candidate stands on a wide variety of issues.

We also note that this Court has held that political candidates can be required by law to disclose where their campaign money comes from and how it is spent. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). Although this information is not printed on the ballot, it is nonetheless required by law to be supplied to voters for the purpose of assisting them in identifying the philosophy of the candidate. The Court stated, "disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid voters in evaluating those who seek federal office. *It*

allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." *Id.* at 66-67 (emphasis added). Similarly, the Court stated, "In many situations the label 'Republican' or 'Democrat' tells a voter little." *Id.* at 70 (upholding campaign disclosure requirements in order to inform the voters of the interest that specific candidates represent).

The use of descriptive ballot language as proposed by the amendment under consideration is legally indistinguishable from party labels and is intended to assist voters in making informed decisions.

CONCLUSION

For the foregoing reasons, the amici curiae States respectfully request this Honorable Court to grant Arkansas' petition for writ of certiorari, and set the case for briefing and argument or, in the alternative, grant the petition and summarily reverse the judgment of the lower court.

Respectfully submitted,

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